Supreme Court, U.S.
FILED
SEP 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1984

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

FRANK L WHITMER AND JOAN P WHITMER,
Petitioners
v
JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R B HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H H ROBERTSON CO., H H ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H S NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L C KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

Frank L Whitmer and Joan P Whitmer
American Citizens on their own behalf, Petitioners
221 Pardridge Place, DeKalb IL 60115, 815/758-7272
September 1990

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PETITIONERS' REPLY BRIEF

FINALITY AND CONFLICTS

The respondents, in their transparent zeal to confine Petitioners to a meaningless appellate procedure, ignore anything that does not suit their needs.

Opposing defendants have limited their objections to only two of the ten questions petitioners have presented:

> whether petitioners can appeal a transfer order under 28 USC § 1404(a),
>
> and whether the Circuit Court of Appeals should treat such an appeal, if necessary, as a petition for a writ of mandamus.

Consequently, respondents John Hancock Mutual Life Insurance Company and Sudler & Company have cited thirty-four cases, defendant (Burke) Wilson & McIlvaine has cited twelve cases, defendant General Parking Corporation has cited three cases, defendant 175 East Delaware Place Homeowners Association has adopted by reference, and the other thirteen or more defendants have neither responded or objected.

Then, without explanation or support, respondents called the attention of this United States Supreme Court to:

> *"On June 26, 1990 Judge Nicholas Bua of the Eastern Division dismissed this suit for want of prosecution when the Petitioners did not appear for a scheduled status before the court. As of the date of this Response to Petition for Writ of Certiorari, Judge Nicholas Bua's June 26, 1990 order of*

dismissal is still in effect, possibly causing Petitioner's Petition for Writ of Certiorari to become moot." (John Hancock Mutual Life Insurance Company Response, pages 4-5)

"On June 26, 1990, the District Court dismissed petitioners' First Amended Complaint with prejudice for want of prosecution. Thus, no underlying cause of action exists as of the date of filing of this response." (Burke Wilson & McIlvaine Brief in Opposition page 2)

As a consequence, all respondents' efforts concerning finality of the order are no longer valid—the transfer order has now become final, therefore appealable, and thereby is, can continue to be, before this United States Supreme Court.

Petitioners and this United States Supreme Court can now cut through the maze of conflicting opinions (including defendants' long list) that Professor Charles Alan Wright in his noted work on the *Law of Federal Courts, Fourth Edition*, introduces as:

"Section 1404(a) has given rise to a veritable flood of litigation. Probably no issue of civil procedure gives rise to so many reported decisions, year after year, as does this seemingly simple statute."

In *Federal Practice and Procedure 2d*, Professor Wright continues:

§3855 note 3. *"Unless a transfer order is reviewed at the time, it will as a practical matter never be reviewed at all. The transferee court hardly can vacate the judgment of the district court after trial, if it were otherwise correct, merely on the ground that the case should not have been transferred. In re Josephson, CA1st, 1954, 218 F2d 174, 180."*

"The propriety of some form of interlocutory review seems quite clear . . . ."

Note 6.1. *"Power of district court. Gower v Lehman, CA4th, 1986, 799 F2d 925, 927, quoting Wright, Miller & Cooper. In this case an order of a district court transferring a case to the Claims Court was held to come under this rule and to be immediately appealable as a collateral order."*

at page 477 *"The decisions are far from consistent among the circuits, or even within a particular circuit, but the overall impression is one of increased willingness by the courts of appeals to decide for themselves whether the trial court properly exercised its discretion on a § 1404(a) motion. Indeed, as has been discussed elsewhere, several of the circuits have now suggested that a district court that grants a transfer order stay that order for a short period so that appellate review may be sought."*

page 481 *"There is no agreement on the use of the writs to review the trial court's exercise of its discretion. The Supreme Court passed up an opportunity to provide guidance on this question, and the decisions of the courts of appeals, as several of them have remarked, are 'in hopeless conflict.' Indeed the variations among the circuits, and the changes of view within a particular circuit, are so great that the law on this point must be examined on a circuit-by-circuit basis.*

Supreme Court: Norwood v Kirkpatrick, 1955, 75 S Ct 544, 547, 349 US 29, 33, 99 Led 789.

Hopeless conflict: Great Northern Ry Co v Hyde, CA8th, 1956, 238 F2d 852, 856."

Obviously a totally disabled pro se plaintiff-petitioner, legally handicapped, recently reexposed to serious toxics on the defendants' premises, and seriously ill—cannot put his life at risk on such *"hopeless conflicts"* both between and within the circuits.

IT IS NOT PETITIONERS' PETITION FOR WRIT OF CERTIORARI THAT HAS BECOME MOOT, IT IS DEFENDANTS' OBJECTIONS TO FINALITY AND CONFLICTS THAT HAVE BECOME MOOT.

Now, for the purpose of review, a determination of finality, or *Cohen*, etc., is no longer necessary as there is a final order, and the transfer order itself has become final and is still before this United States ~~District~~ Supreme Court.

ALL ISSUES IN PETITIONERS' "QUESTIONS PRESENTED" ARE PROPERLY BEFORE THIS UNITED STATES SUPREME COURT

Petitioners expect that this is a case of first impressioin for they hope that no other case of the many proposed to this United States Supreme Court involves:

a choice between justice,
or the health, life and death of a plaintiff.

Petitioners filed their Petition for Writ of Certiorari because no other Court of Appeals had, or would attend to, the grave violations of their constitutional rights to due process, equal protection and access to the courts by the Federal district Courts. It is for this reason that petitioners specifically invoked Rule 10(a) of the Supreme Court. (Petition for Writ of Certiorari, p30.)

Rules of the Supreme Court, Rule 10. (Emphasis added.)

"A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * *

(c) When . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court."

Petitioners ten "Questions Presented" are more than a notice of appeal as a petition for writ of mandamus, or the appealability of a venue transfer—they are actually the total reason for petitioners being in the federal courts of review—a constant denial or ignoring in any court of their injury, their disabilities, or their handicaps, and the consequent destruction of not only their health but their cause.

This includes the ignoring and suppression of petitioner Frank L Whitmer's adjudication as totally disabled by a Social Security Administrative Law Judge, the further ignoring and suppression of uncontroverted medical affidavits and evidence, willfull violations of the rules,

sanctions and tainted motions, denial of discovery, and the protection of an injured plaintiff's health and life from the very people that he claims first injured him.

Each and every one of petitioners' "Questions Presented" were established and objected to in the Federal district Court, excepting, of course, those dealing with a conflict in the circuits—and even there the federal district court judge himself had laid out exactly the procedure petitioners had expected would be followed.

Petitioners' ten "Questions Presented" clearly support their concern of deprivations of constitutional rights as citizens of the United States and the State of Illinois. This was also the actual thrust of their Notices of Appeal to the Seventh Circuit Court of Appeals.

Not only did they not succeed in that contention with that Court of Appeals, but as question six states, six critical pages were stripped from petitioners' Notice of Appeal by the defendants in their motion to dismiss—and petitioners appeal was improperly dismissed over their objections.

Petitioners' Petition for a Writ of Certiorari is totally based on the actual pleadings, motions, and supporting affidavits provided to the Federal District Courts and the United States Court of Appeals.

The Illinois Housing Court Judge's statement regarding the ventilation code violations in the John Hancock Center in Chicago were clearly, *"you may have an action against John Hancock or even against the city for malfeasance."* (Transcript March 7, 1984, page 185.)

That is what petitioners have been trying to do over the last few years.

The health and safety violations and the litigation are not ordinary. It is a matter of health, life and death, and the realistic enforcement of the protections of the health and safety codes against powerful and wealthy major American corporations.

CONCLUSION

Sooner, or later, life—death—freedom—and health is exactly what liberty is all about.

Petitioners ask that this Court issue its petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Frank L Whitmer and Joan P Whitmer
American Citizens on their own behalf, *Petitioners*
221 Pardridge Place, DeKalb IL 60115, 815/758-7272
20 September 1990

[appendix follows]

Minute Order

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Nicholas J Bua
Case Number 89 C 8341 June 26, 1990

FRANK WHITMER v. JOHN HANCOCK MUTUAL LIFE INSURANCE CO.

[Other docket entry:]

Cause called for status hearing. Plaintiffs failed to appear. Order cause dismissed for want of prosecution.

Docketing to mail notices.
courtroom deputy's initials: fda'
number of notices: 14 & MF
date docketed: June 27, 1990
docketing dpty: initials: LG
date mld notices: June 27, 1990
mailing dpty: initials LG